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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1954

No. 209

KEITH M. BEATY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No.

KEITH M. BEATY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 14, 1954 (App., infra, p. 45, R. 23, Vol. IV), based on an opinion of said Court rendered on June 14, 1954 (App., infra, p. 27, R. 3, Vol. IV) affirming the judgment of the United States District Court for the Western District of North Carolina entered January 25, 1954 (R. 551-2, Vol. I.)*

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (App., infra, p. 27, R. 3, Vol. IV), is not yet reported.

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* The references to the Record (R) herein contained are to Volumes I & IV of Transcript of Record, Appendix of appellant below, and Proceedings in the Court of Appeals, duly certified.

The references to Minutes of Trial refer to pages of the 8 volume record consisting of the original record filed in the Court of Appeals and certified to this Court.

JURISDICTION

The opinion was promulgated on June 14, 1954 (App., infra, p. 27, R. 3, Vol. IV) and the judgment of the Court below was entered on June 14, 1954 (App., infra, p. 45, R. 23, Vol. IV). An order for stay of mandate was entered by the Court of Appeals on June 17, 1954 (R. 23, Vol. IV). The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 United States Code.

QUESTIONS PRESENTED

1. Did the trial court depart from the accepted and usual course of judicial proceedings and deprive the petitioner of his constitutional right to a fair and impartial trial by jury by admonishing and warning the jury that they might be watched by some agency and "amenable to punishment for having desecrated the oath of your office"? (App., infra. p. 49, Minutes of Trial pp. 53 & 54)

2. Did the District Court err, by permitting the respondent over the objection of petitioner, to exhibit to the jury charts and computations of government agents not introduced in evidence and admittedly prepared before the trial and not based upon the testimony adduced during the trial?

3. Did the trial court err by permitting the government agents, over the objection of petitioner, to testify and present their conclusions with respect to the aforesaid charts and computations, prepared before the trial and not based upon the evidence offered by the government during the trial?

4. May a criminal conviction based on the expenditures method of determining taxable income be sustained where the government has failed to establish with reasonable certainty the starting point base of its expenditure com-

putation omitting, among other things, a substantial amount of cash ($100,000) shown by the testimony of the government's own witnesses to have been possessed by the taxpayer at the starting point of the government's expenditure computations?

5. May the government shift to the taxpayer the burden of proving the items which should or should not be included at the starting point of the government's expenditure calculation and may the Court require an explanation from the taxpayer as to the reason for his having $100,000 cash on hand at the beginning of the taxable period?

6. May the trial court, in a criminal tax evasion case based on circumstantial evidence, refuse to give the jury any instruction on circumstantial evidence whatever and, after having agreed to give a charge on circumstantial evidence, refuse in the presence of the jury to give such an instruction when again requested to do so by petitioner's counsel?

7. Did the court below err in holding and deciding that the United States District Court for the Western Judicial District of North Carolina had jurisdiction to indict and try the petitioner although his income tax returns were filed at Greensboro, North Carolina at the office of the Collector of Internal Revenue within the jurisdiction of the United States District Court for the Middle Judicial District of North Carolina and the offense charged in the indictment was alleged to have been committed on the dates the income tax returns were filed?

8. Whether the indictment in this case should have been dismissed by the District Court on the ground that the orderly procedure required by law was not followed by the United States Attorney in presenting these cases to the Grand Jury and whether the Grand Jury proceedings were irregular and unlawful because the Attorney General of the United States had not directed that the

cases be presented to the Grand Jury as required by Executive Order No. 6166, Section 5; Section 3740, Title 26 of the United States Code and as provided by Circular Letter No. 2431 dated August 10, 1933 addressed to "All United States Attorneys", issued by the Attorney General of the United States in compliance with said Executive Order.

9. Did the District Court err by departing from the accepted and usual course of judicial proceedings by instructing one juror in the absence of the other eleven as to the propriety of a recomendation for mercy and in promising that he would follow the recommendation?

10. Was petitioner deprived of a substantial right under Rule 30 of the Federal Rules of Criminal Procedure, due to the failure of the trial court to exclude the Jury and allow petitioner's counsel to make objections to the charge of the Court out of the hearing of the Jury?

11. Was the petitioner deprived of a substantial right under Rule 30 of the Federal Rules of Criminal Procedure where prior to the argument to the jury of defendant's counsel the trial court, pursuant to said Rule 30, stated that he would give a certain requested charge and, after argument to the jury changed his mind and refused to give the charge as promised?

STATUTES, EXECUTIVE ORDERS, CIRCULAR LETTERS, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

STATUTES

United States Code, Title 28, Section 1254(1) (App., infra, p. 46).

Internal Revenue Code, Title 26:

Section 145(b) Penalties (App. infra, p. 46).

Section 53(b) To Whom Return Made (App., infra, p. 46).

Section 3740 Authorization to Commence Suit (App., infra, p. 47).

Section 3761 Compromises—(a) Authorization (App., infra, p. 47).

Executive Order

Executive Order No. 6166, Section 5 (promulgated June 10, 1933, 5 U.S.C. 1946 Ed., Section 124-132) (App., infra, p. 47).

Circular Letter

Circular Letter 2431 issued by the Attorney General of the United States pursuant to Executive Order 6166, supra. (App., infra, p. 48).

Constitutional Provisions

Article VI of Amendments to The Constitution of the United States of America (App., infra, p. 48).

Federal Rules of Criminal Procedure

Rule 30, 18 U.S.C.A. following Section 687 (App., infra, p. 48).

Federal Rules of Civil Procedure

Rule 51, 28 U.S.C.A. following Section 723 (App., infra, p. 49).

STATEMENT OF THE CASE

On March 4, 1952 the petitioner was indicted under Section 145(b), 26 U.S.C. in the United States District Court for the Western District of North Carolina, at Charlotte, North Carolina for attempting to defeat and evade a large part of his individual Federal income taxes for the calendar years 1945, 1946 and 1947 (R. 1-4, Vol. I), Case No. 338.

On the same day, the petitioner was indicted as President of Beaty Service Company, Inc. for causing the cor-

poration to attempt to defeat and evade a large part of its corporate income taxes for the fiscal years ended June 30, 1946, 1947 and 1948 (R. 13-16, Vol. I), Case No. 339. As stated by the District Court, this was in reality a charge against the corporation (R. 13, Vol. I).

The District Court denied the right of the United States to join the charges (R. 17, Vol. I) and the United States Attorney elected to try the individual case, No. 338.

Petitioner duly and timely filed motions to dismiss the indictment on the ground that the District Court for the Western District of North Carolina was without jurisdiction and that petitioner was indicted without the direction of the Attorney General as required by Executive Order No. 6166, Section 5, and the Circular Letter of the Attorney General No. 2431, dated August 10, 1933 (R. 4, Vol. I). These motions were denied by the District Court (R. 12, Vol. I).

The office of the United States Collector of Internal Revenue for the District of North Carolina was, during the period involved in this case, and is now located at Greensboro, North Carolina. The office of the said Collector (now known as Director) and the City of Greensboro, North Carolina were and are located within the judicial district of the United States District Court for the Middle District of North Carolina. The office of the Collector and the City of Greensboro are not within the jurisdiction of the District Court of the United States for the Western District of North Carolina where this petitioner was indicted and tried (App., infra, p. 29, R. 5, Vol. IV).

Pursuant to Section 53(b) of the Internal Revenue Code, supra, the petitioner filed his individual Federal income tax returns for the years 1945, 1946 and 1947 with the Collector of Internal Revenue for the District of North Carolina at the Collector's office located at Greens-

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boro, North Carolina, within the judicial district of the United States District Court for the Middle District of North Carolina.

Immediately after the Jury was impaneled the Court warned the Jury that it might be watched "by some agency that had in mind the prime purpose of seeing that a fair verdict" was rendered in the case and that a member of the Jury might be amenable to punishment. (Page 49 Appendix, infra, page 53 minutes of trial.) Thereupon petitioner moved for a mistrial (page 58 minutes of trial) which motion was denied by the District Court.

Beaty Service Company, Inc. was a North Carolina corporation which during the years involved operated a small fleet of taxicabs in Charlotte, North Carolina. The petitioner was President of this corporation.

At the trial of the case respondent substantially relied upon a computation prepared by Special Internal Revenue Agent Cline purporting to show that during the years 1945 and 1946 petitioner expended respectively $32,855.60 and $56,595.67 in excess of his reported receipts. The agent, Cline, admitted under cross-examination that he failed to give petitioner credit in his (the agent's) computations for cash monies that petitioner had on hand at the beginning of the year 1945 (R. 136, Vol. I). This in spite of the fact that the Government's own witnesses, bankers of Charlotte, testified that as of January 1, 1945 petitioner had on hand approximately $100,000 in cash (R. 125, Vol. I). The charts and computations of Cline were shown to the Jury over the objection of counsel for petitioner (R. 132-133, Vol. I) and the Court denied petitioner's motion to strike Cline's testimony (R. 353-354, Vol. I).

The United States also based its case in part on the proposition that Beaty Service Co., Inc. omitted from its books and tax returns monies which allegedly should have

been received by the corporation from the operation of taxicabs and the sale of obsolete or wrecked cabs or automobiles. The respondent attempted to prove these alleged omitted receipts by circumstantial evidence and again attempted to prove by circumstantial evidence that petitioner had received these alleged corporate receipts and diverted them to his own use. The United States contended that the corporation was taxable in full on these alleged omitted receipts (R. 321, Vol. I) and that petitioner, the individual, was also taxable in full on the full amount of these alleged receipts (R. 321, Vol. I).

The Government based its case in this regard on charts, formulas and computations prepared by Revenue Agents Cline and Parrish purporting to show the monies which the corporation would have received if it had operated its fleet of 32 to 34 taxicabs full time. This was pure circumstantial evidence refuted by the testimony of the Government's own witnesses—seventy-eight taxicab drivers who testified that the cabs did not operate full time; that they were wrecked; had to be repaired; that the drivers themselves failed to pay into the company monies due and that the drivers drank, gambled, and did not work regularly or pay regularly (R. 109-111, Vol. I). The attempt of the Government to show that the petitioner received or diverted any of such alleged receipts by the corporation was again pure circumstantial evidence. There was no direct evidence in the case showing that Mr. Beaty received or diverted any monies of the corporation. Government Agent Parrish admitted that no monies were paid Mr. Beaty from the sale of automobiles (R. 145, Vol. I). This testimony of the Government agents was received in evidence over the objection of petitioner's counsel and the Court denied petitioner's motion to strike the testimony of Government Agents Parrish and Cline (R. 353-354, Vol. I).

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The trial court explained his position and stated to the jury, "• • • if someone was stealing from Mr. Beaty, it was his duty to find it out and prosecute them. • • •" (R. 149, Vol. I). We all know that one who is the owner or has to be president of a corporation, that whether anything would be paid directly to him or to someone for him, the corporation would supposedly receive that amount and be chargeable therewith if it was income." (R. 149, Vol. I).

The Government witness Parrish, on cross-examination, admitted that in order to justify the additional net income attributed to this petitioner through the Beaty Service Company, Inc., that taxicabs of the Beaty Service Company, Inc. would have had to operate approximately 100% of the time and that in a period of two years Beaty Service Company would have had to have more cabs than it actually licensed to derive the monies which the Government agents computed as income (R. 177, Vol. I).

The United States further contended that, based on the computations of Government Agents Parrish and Cline, the petitioner underpaid taxes for the years 1945 and 1946 of $13,152.09 and $13,830.72 on the net income of Lancaster Distributing Company, operated by one E. C. Pundt. It was the position of the Government that the petitioner and not Pundt was taxable on the entire income of Lancaster.

Agent Cline admitted that the Government agents gave no credit to petitioner for the income taxes paid by Pundt on the profits of $94,512.08 from the business (R. 137 and 139, Vol. I). Mr. Pundt testified that he did not "kick back" to petitioner any profits or receipts from Lancaster and that he, Pundt, paid the income taxes on the profits of the business from monies which came out of the business (R. 121, Vol. I).

At the outset of the trial respondent was permitted to place before and exhibit to the Jury large placards or charts showing the conclusions and computations of the

Government Agents. The defendant's objections to these charts and computations were overruled by the District Court (R. 132, Vol. I).

At the close of the Government's testimony (R. 354, Vol. I) and again at the close of all the testimony (R. 485, Vol. I) the petitioner moved for judgment of acquittal, which motions were denied by the Court.

Trial of the case was commenced on November 30, 1953. The trial was concluded on the 18th day of December, 1953, on which date, the Jury returned the following verdict: (R. 535, Vol. I) "We of the jury find the defendant guilty as charged on all counts, but we recommend to this Court that due to health condition of Mr. Beaty that mercy be—that we would recommend mercy." Previous to the finding of the jury, one juryman left the jury room (App. 52), came into the Courtroom with permission of the Court, and sought to speak to the Court privately, and then upon being told by the Court that he would have to make a public statement, he said, "I just want to know of the Court if any recommendation can be made because of health condition." The Court replied, "A recommendation is always proper to be made by the jury, and if made by the jury as part of their verdict returned will be adhered to by the Court." (R. 534, Vol. I).

Following the verdict of the jury, the defendant moved for a new trial and for arrest of judgment (R. 537, Vol. I). The defendant also renewed his motions to dismiss the indictment and for judgment of acquittal. The District Court overruled the motion for a new trial and in arrest of judgment and also overruled defendant's renewed motions for the dismissal of the indictment and for judgment of acquittal (R. 543-545, Vol. I).

The judgment of the District Court was that the petitioner be imprisoned for a period of two years on each Count (R. 551, Vol. I), the sentences to run concurrently.

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In addition the petitioner was fined $20,000 and required to pay all costs of the trial (R. 551-2, Vol. I).

The petitioner duly and timely filed an appeal from the judgment of the District Court to the United States Court of Appeals for the Fourth Circuit.

On June 14, 1954, the Court of Appeals rendered an opinion affirming the judgment of the District Court (App., infra, p. 27, R. 3, Vol. IV). Judgment was entered by the Court of Appeals on June 14, 1954 (App., infra, p. 45, R. 23, Vol. IV).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below in approving the warning given by the District Court to the Jury at the very outset of the trial is not in accord with the decision of this Court in *Remmer v. United States,* 347 U.S. 227, 74 S. Ct. 450 (March 8, 1954).

In that case this Court emphasized that a juror "must feel free to exercise his functions" without the F.B.I. or anyone else looking over his shoulder. It was highly prejudicial and in violation of the Constitutional rights of this petitioner to a free and impartial trial by jury for the trial judge to admonish the Jury that they might be watched by some agency and "amenable to punishment for having desecrated the oath of your office". (Appendix, infra, p. 49, Minutes of Trial, pp. 53-4.) We respectfully submit that the sanction by the Court of Appeals of the trial court's departure from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

II.

The decision of the Court of Appeals involves substantial questions of Federal law, particularly vital in criminal tax evasion cases, and is in conflict with a number of decisions of other Courts of Appeal.

(a) The decision of the Court below is in direct conflict with the principles enunciated by the United States Court of Appeals for the Fifth Circuit in *Demetree v. United States*, 207 F. (2d) 892. In that case the Court condemned the practice under which the Government, having little or no direct evidence to offer and endeavoring to prove the case by circumstantial evidence, offers computations and estimates as the basis for a conviction "• • • not upon evidence of facts but upon speculation and theorizing by the Government's witnesses as to what the facts really are • • •".

In the instant case, the respondent was allowed to place before the Jury at the beginning of the trial and over objection of petitioner, charts and computations admittedly prepared before the trial and not based upon evidence adduced during the trial. Government Witness Parrish testified that he did not base his statements on the testimony as it came from the stand and said "no, sir. Those charts were prepared before the trial started" (R. 184, Vol. I).

This squarely distinguished this case from that of *United States v. Johnson*, 319 U.S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546, where the computations admitted into evidence were prepared on the basis of testimony adduced during the trial and from the witness stand.

The decision of the Court below is also in conflict with *Bryan v. United States*, 175 F. (2d) 223 (Fifth Circuit); *United States v. Fenwick*, 177 F. (2d) 488 (Seventh Circuit); *United States v. Michener*, 152 F. (2d) 880, 883 (Third Circuit).

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Please see also *Cooper v. United States,* 9 F. (2d) 216 (C.A. 8); *Continental Casualty Co. v. First National Bank,* 116 F. (2d) 885 (C. A. 5) and 135 A.L.R. 1141.

(b) The decision of the Court of Appeals is in conflict with decisions in four other circuits holding that where the United States attempts to establish an understatement of income by the expenditures method, the net worth method, or both combined, the starting point of the expenditure case or net worth computation must be definitely established. *Bryan v. United States,* supra (C.A. 5); *United States v. Fenwick,* supra, (C.A. 7); *United States v. Calderon,* 207 F. (2d) 377 (C.A. 9); *United States v. Caserta,* 199 F. (2d) 905 (C. A. 3).

In the case at bar the Government substantially relied on the computation and chart of Revenue Agent Cline purporting to show that during the years 1945 and 1946 petitioner expended approximately $89,000 more than he reported in his tax returns as net receipts. On cross-examination, Cline admitted that he failed to give petitioner credit for cash he had on hand as of the beginning of the period, January 1, 1945 (R. 136, Vol. I). This in spite of the fact that the Government's own witnesses, bankers, testified that petitioner had on hand at the beginning of the period, January 1, 1945, approximately $100,000 (R. 125, Vol. I). This is a perfect illustration of the expenditure method of establishing unreported income and also a perfect illustration of the Government's failure to establish definitely the starting point for the expenditure calculations. Here there was not only an absence of starting point evidence but also downright error and disregard for the cash on hand at the starting point.

The Court below stated that no explanation was given as to the cash on hand at the beginning of 1945 (App. infra, p. 40). However, petitioner was not tried for understatement of income for years prior to 1945; he was

under no duty to explain how he had accumulated the money prior to 1945; and this is another illustration of what has come to pass in this type of case, as stated by the Court in *Demetree v. United States*, supra (C.A. 5), as follows:

> "• • • Further and more prejudicial to a defendant, there has grown up a kind of ancillary theory that the government, by introducing proof of deposits, expenditures, etc., having put up what it calls a prima facie case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the government establish his guilt by legal and credible evidence beyond a reasonable doubt. • • •"

On June 7, 1954, this Court granted petitions for writs of certiorari in the following cases, involving the same or similar points as are here under consideration:

Holland v. United States (C.A. 10) 209 F. (2d) 516 No. 37);

United States v. Calderon (C.A. 9) 207 F. (2d) 377 No. 25);

Smith v. United States (C.A. 1) 210 F. (2d) 496 (No. 52);

This Court also on June 7, 1954 vacated previous orders denying certiorari in *Friedberg v. United States* (C.A. 6) 207 F. (2d) 777, decided October 16, 1953 (now renumbered 18); *Goldbaum v. United States* (C. A. 9) 204 F. (2d) 74; *Banks v. United States* (C.A. 8) 204 F. (2d) 666 and *McFee v. United States* (C. A. 9) 206 F. (2d) 872. These cases also involve similar points.

Holland v. United States, supra, is strikingly similar to the instant case because the government based its case on the expenditures of the taxpayer and failed to include as of the beginning of the period involved a $113,000 cash fund claimed by the taxpayer (pages 6 and 7 of Holland petition).

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In *United States v. Calderon,* supra, the petition for certiorari states that the Calderon case is inconsistent in principle with the holding in *Holland v. United States,* supra (page 9, Government's petition).

(c) The decision of the Court below is in conflict with decisions of the Fifth, Sixth, Seventh and Eighth Circuits, holding or acknowledging the principle that where a criminal case is based on circumstantial evidence, the trial court is required to give some form of instruction to the general effect that the evidence must be inconsistent with every reasonable hypothesis but that of guilt. *Stutz v. United States,* 47 F. (2d) 1029 (C.A. 5); *Anderson v. United States,* 30 F. (2d) 485, 487 (C. A. 5); *Bryan v. United States,* supra, p. 226; *Strickland v. United States,* 155 F. (2d) 167, 168 (C. A. 5); *McLendon v. United States,* 13 F. (2d) 777, 779 (C.A. 6); *Epstein v. United States,* 174 F. (2d) 754, 769 (C.A. 6); *United States v. Fenwick,* 177 F. (2d) 488, 490 (C.A. 7); *Gurera v. United States,* 40 F. (2d) 338, 340 (C. A. 8); *Banks v. United States,* 204 F. (2d) 666, 672 (C.A. 8).

The decision of the Court below is inconsistent with its own decision in *Garst v. United States,* 180 F. 339, 342, 343 (C.A. 4).

The petitioner herein requested an instruction on circumstantial evidence (R. 478, Vol. I). The District Court agreed to give an instruction on circumstantial evidence (R. 488-9, Vol. I) but after charging the Jury refused to give any instruction on circumstantial evidence, when again requested to do so by counsel for petitioner (R. 530-1, Vol. I). Proper exception was noted (R. 533-4, Vol. I).

The Court of Appeals pointed out that the District Court had clearly charged on reasonable doubt and thus rendered unnecessary an instruction on circumstantial evidence (App., infra, p. 43). This conclusion of the Court below is squarely in conflict with the decision of the

Sixth Circuit in the recent case of *Hanson v. United States*, 208 F. (2d) 904 wherein the defendant requested a charge on circumstantial evidence in essentially the same language as the request herein. The Sixth Circuit held that the appellant's rights were not sufficiently stated or protected by an instruction on proof of guilt beyond a reasonable doubt and that appellant was entitled to an instruction on circumstantial evidence, citing *Epstein v. United States*, supra and *Hendrey v. United States*, 233 F. 5, 19 (C.A. 6).

The decision of the Court below is also in conflict with *Downie et al. v. Powers* (C.A. 10) 193 F. (2d) 760, 766, involving a change of mind by the Court with respect to giving a requested charge.

The decision of the Court of Appeals is also inconsistent with its own decision in *Lovely v. United States*, 169 F. (2d) 386, 391, holding it error to require counsel to except to request for a charge in the presence of the Jury.

In *Holland v. United States*, supra, (certiorari granted June 7, 1954) one of the substantial points involved was the refusal by the District Court to give an instruction on circumstantial evidence essentially similar to the one requested here and approved in principle by the Sixth Circuit in *Hanson v. United States*, supra.

As has been developed hereinabove, the precise questions here involved have arisen with great frequency as a result of the ever increasing tendency of the Internal Revenue Service and the Department of Justice to resort to the expenditures method or net worth method or a combination of both methods and the use of charts and computations as a basis for tax evasion prosecutions.

III.

The decision of the Court below that the United States District Court for the Western District of North Carolina had jurisdiction is not in accord in principle with the decisions of this Court; is in conflict with the decisions of other circuits and is inconsistent with its own decisions.

The indictment charged in its three counts that the appellant did wilfully and knowingly attempt to defeat and evade a large part of his individual income taxes due and owing to the United States for the calendar years 1945, 1946 and 1947 (R. 2, 3, 4, Vol. I). The dates of the offenses as charged in the three counts were, respectively (R. 2, 3, 4, Vol. I):

1. On or about March 14th, 1946 with respect to the calendar year 1945.

2. On or about March 15th, 1947 with respect to the calendar year 1946.

3. On or about March 14th, 1948 with respect to the calendar year 1947.

These dates were the dates on which the petitioner filed his income tax returns for the calendar years 1945, 1946, and 1947, which returns are alleged in the indictment to be false and fraudulent.

Thus the question is squarely presented as to whether the offenses of attempting to evade, charged in the indictment, were committed at Greensboro, North Carolina, *where the returns were filed, within the jurisdiction of the United States District Court for the Middle District of North Carolina* or at Charlotte, North Carolina, where the appellant lived and within the jurisdiction of the District Court for the Western District of North Carolina, where he was indicted.

In *United States v. Lombardo,* 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897, this Court held that a resident of the State of Washington was guilty of an offense in the City of Washington, District of Columbia, for failing to file with the Commissioner General of Immigration, in the District of Columbia, a statement in writing required by an Act of Congress.

In *Rumely v. McCarthy,* 250 U.S. 283, 39 S. Ct. 483, 486, 63 L. Ed. 983, this Court said:

• • • •

> "It is contended, indeed, that there was no probable cause to believe that the offense charged in the Washington indictment was committed within the District of Columbia, and this upon the ground that appellant was not personally present in the District at the time of the alleged offense, and that he was under no duty to make report there to the Alien Property Custodian. The commissioner, however, found as a matter of fact that the Custodian's office was in the District of Columbia, and as the finding was supported by competent evidence the District Court properly held that it was not reviewable on writ of habeas corpus. That being so, the duty imposed by the statute to make report to the Alien Property Custodian involved the duty to make such report in the District of Columbia, and failure to make it was an offense against the United States committed in that District. United States v. Lombardo, 241 U.S. 73, 76, 36 S. Ct. 508, 60 L. Ed. 897; New York C. & H. R. R. Co. v. United States, 166 F. 267, 269, 92 C.C.A. 331."

• • • •

We believe that the decision of the Court below fails to follow the above decisions by this Court.

The decision of the Court of Appeals is in conflict with the following decisions:

Wampler v. Snyder, Marshal (Court of Appeals, D.C.) 62 App. D. C. 215, 66 F. (2d) 195.

United States ex rel Wampler v. Hill, Warden, 8 F. Supp. 469, affirmed 74 F. (2d) 920 (Third Circuit).

In *Wampler v. Snyder, Marshal,* supra, the Court of Appeals for the District of Columbia said:

• • • •

> "The Act provides that the income tax return 'shall be made' to the collector for the district in which is the legal residence of the taxpayer. The office of the Collector, as we have seen, is in the city of Baltimore in the State of Maryland. It is there and nowhere else that the return 'shall be made,' and the mere placing of the return in the mail in Washington city is not a compliance with the statute. The words 'shall be made,' as used in the Statute, are the equivalent of 'shall be filed,' and to file a paper is to deliver it at the place where it is to be lodged and kept. When the mails are utilized for this purpose, the filing takes place upon delivery at the office of the official required to receive it. See United States v. Lombardo (D.C.) 228 F. 980, 982, and cases cited, affirmed 241 U.S. 73, 36 S. Ct. 508, 60 L. Ed. 897."

• • • •

The decision of the court below is inconsistent with its own decisions in the following cases: *Bowles v. United States* (C.A. 4) 73 F. (2d) 772, 774, approving *Wampler v. Snyder, Marshal,* supra, and holding that the offense charged was committed where the filing took place.

In *Reass v. United States* (C. A. 4) 99 F. (2d) 752, the Court below not only reaffirmed its decision in *Bowles v. United States,* supra, but spelled out A. B. C. just what these decisions mean, viz. that the preparation of a return, including the mailing thereof, does not constitute the criminal offense under the statute involved, the crime being committed upon the filing of the return with the Collector.

Shurin v. United States (C. A. 4) 164 F. (2d) 566, 569 again reaffirmed *Bowles v. United States,* supra, reap-

proved the doctrine of *Wampler v. Snyder, Marshal,* and relied on *Reass v. United States,* supra.

We think that the law of the case was correctly stated by the District Court in the *United States v. Aaron* and *United States v. Bridwell,* 117 F. Supp. 952, 954, as follows:

• • • •

> "The same questions arose in a recent case before Judge Darr in the Eastern District of Tennessee. United States v. Lefkoff, 113 F. Supp. 551, 556. Judge Darr states:
>
> " 'The crimes alleged in the indictment follow closely the language of the statute, 26 U.S.C.A., Page 145(b) and consist of a single act which occurred at one place and one time and the offense is to be tried only at the one place even though the preparations may occur elsewhere. Reass v. United States, 4 Cir., 99 F. 2d 752; Shurin v. United States, 4 Cir., 164 F. 2d 566; Eisler v. United States, 84 U.S. App. D.C. 404, 176 F. 2d 21; United States v. Newton, D. C., 68 F. Supp. 1952, affirmed, Newton v. United States, 4 Cir., 162 F. 2d 795.' "

• • • •

This accords with the indictment in this case which charges that the offense of attempting to defeat and evade income taxes was committed on the dates the returns were filed at Greensboro within the Middle District of North Carolina and not at Charlotte, within the Western District of North Carolina.

The Court below relied on *Newton v. United States* (C. A. 4) 162 F. (2d) 795. However, in that case Newton was not the taxpayer. He did not file a return. He was indicted for aiding and abetting in the preparation of a false and fraudulent return. His offense was entirely performed in the District where the return was prepared.

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IV.

The petitioner was not indicted by direction of the Attorney General as required by Executive Order No. 6166, Section 5 (promulgated June 10, 1933, 5 U.S.C. 1946 Ed. Section 124-132); Circular Letter No. 2431 issued by Attorney General pursuant to Executive Order No. 6166, supra; and Section 3740, Title 26 United States Code (App., infra, p. 47). (R. 4, Vol. I, Motion to dismiss, paragraph 3, R. 12, Vol. I motion overruled by Court).

On June 7, 1954 this Court granted the petition for certiorari of Odom Farrell Sullivan, No. 747, October Term, 1953, now renumbered No. 64. The point here at issue was relied upon by the petitioner Sullivan at pages 10 to 12 of his petition filed with this Court.

V.

The Court below approved the action of the District Court in instructing one juror in the absence of the other eleven as to the propriety of a recommendation for mercy and in promising that he would follow the recommendation.

The proceedings which took place between the District Court and one juror are set forth in the Appendix, infra, page 52. (See also R. 534, Vol. I)

The decision of the Court below is in conflict with the recent decision of the Fifth Circuit in *Demetree v. United States*, 207 F. (2d) 892, 895.

It is also inconsistent with the Court of Appeals own decision in *Lovely v. United States*, 169 F. (2d) 386, 391.

Please see also *Ryan v. United States* (C. A. 8) 99 F. (2d) 864 and *Coward v. Commissioner*, 164 Va. 639, 178 S.E. 797.

The Court of Appeals itself stated (App. infra, pp. 44-45)—

> "• • • Undoubtedly communications between the court and the jury should be made in the presence of all the jurors • • •."

We submit that if the jeopardy of the defendant was to be made the subject of a trade or compromise, he was entitled to have all the jurors hear to what the Court had agreed and the eleven jurors should not have had to rely on the version of the agreement as it came from the lips of a juror who was interested enough to attempt to have a private conversation with the trial judge. (App., infra, p. 52, R. 534, Vol. I)

We know not what the lone juror said to the other members of the jury upon his return to the jury room. However we respectfully submit that the colloquy of the trial judge with the one juror was prejudicial to the rights of petitioner and might well have induced the verdict of the jury which obviously was in doubt. We again submit that the sanctioning by the court below of the action of the trial court calls for an exercise of this Court's power of supervision.

VI.

The court below held in substance that under Rule 30 of the Federal Rules of Criminal Procedure (referred to by the court in its opinion as Rule 51 (App., infra, p. 49) petitioner's attorneys were required to request of the trial court that the jury be excluded while petitioner's objections were made to the court's charge.

Every experienced trial lawyer knows that juries are very inquisitive and that they do not like to be excluded from the proceedings in the court room. For defendant's counsel to be required to request at this critical stage of the trial that the Jury be excluded would be highly prejudicial to petitioner's Constitutional right to a fair trial.

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Obviously the drafters of Rule 30 of the Federal Rules of Criminal Procedure had this in mind when they adopted the mandatory provision of Rule 30 that "opportunity shall be given to make the objection out of the hearing of the jury"; and undoubtedly they further had in mind some action by a trial court similar to what actually took place here when the Court said to the jury: "Every lawyer who makes contest for a case and prosecutes or defends is zealous. He desires to win. That is the American way, to win, and being desirous of that fact he becomes zealous; * * *" R. 530-531, Vol. I).

It is respectfully submitted that the provisions of Rule 30 are mandatory; that the trial court should have excluded the Jury without the defendant being required to request such exclusion and that it was highly prejudicial to defendant for the Court to tell the jury that counsel was "zealous" as described hereinabove.

The Fourth Circuit Court of Appeals itself correctly stated the rule in a rape case, *Lovely v. United States,* 196 F. (2d) 386, 391, as follows:

> "Federal Rules of Criminal Procedure, Rule 30, 18 U.S.C.A. following section 687. Ordinarily, failure to observe the requirements of this rule will be held sufficient ground for granting a new trial, unless it affirmatively appears that no prejudice resulted therefrom; for counsel should not be required in the presence of the jury to place themselves in the attitude of apparent antagonism to the trial judge which is involved in excepting to the charge."

The petitioner again respectfully submits that the court below erroneously sanctioned the unusual interpretation by the trial court of the provisions of Rule 30 in an income tax case and the trial court's remarks to the Jury and that this again calls for this Court's power of supervision and the clarification by this Court of Rule 30 as applied to Federal tax cases.

VII.

Rule 30 of the Federal Rules of Criminal Procedure provides "the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, * * *".

Judge Murrah of the Tenth Circuit Court of Appeals in the case of *Downie et al. v. Powers et al.*, 193 F. (2d) 760, 766, considered Rule 51 of the Federal Rules of Civil Procedure which rule contains the identical language above quoted and in substance stated that this rule is too plain for misunderstanding and its purpose was to let counsel know what could or could not be argued to the jury and that where the trial court changes its mind after arguments have been made a new trial should be granted, or at least counsel should be given an opportunity to reargue its case. We submit that this is highly important for the reason that where, as in this case, counsel is told what the trial court will charge (R. 488, Vol. I) and relies on that statement of the trial court, there is no more effective way of reducing counsel's argument to a nullity and of depriving the defendant of a fair trial than for the court, in the presence of the jury, to openly state to counsel for the defendant, as was done in this case, that he refused to give the charge on circumstantial evidence (which he had promised to give (R. 488, Vol. I)) for the reason that this was not a case where a charge on circumstantial evidence was required (R. 530, Vol. I).

Rule 30 being so important, we submit that this Court should use its power of supervision and clarify the meaning of the same.

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CONCLUSION

Petitioner respectfully submits that this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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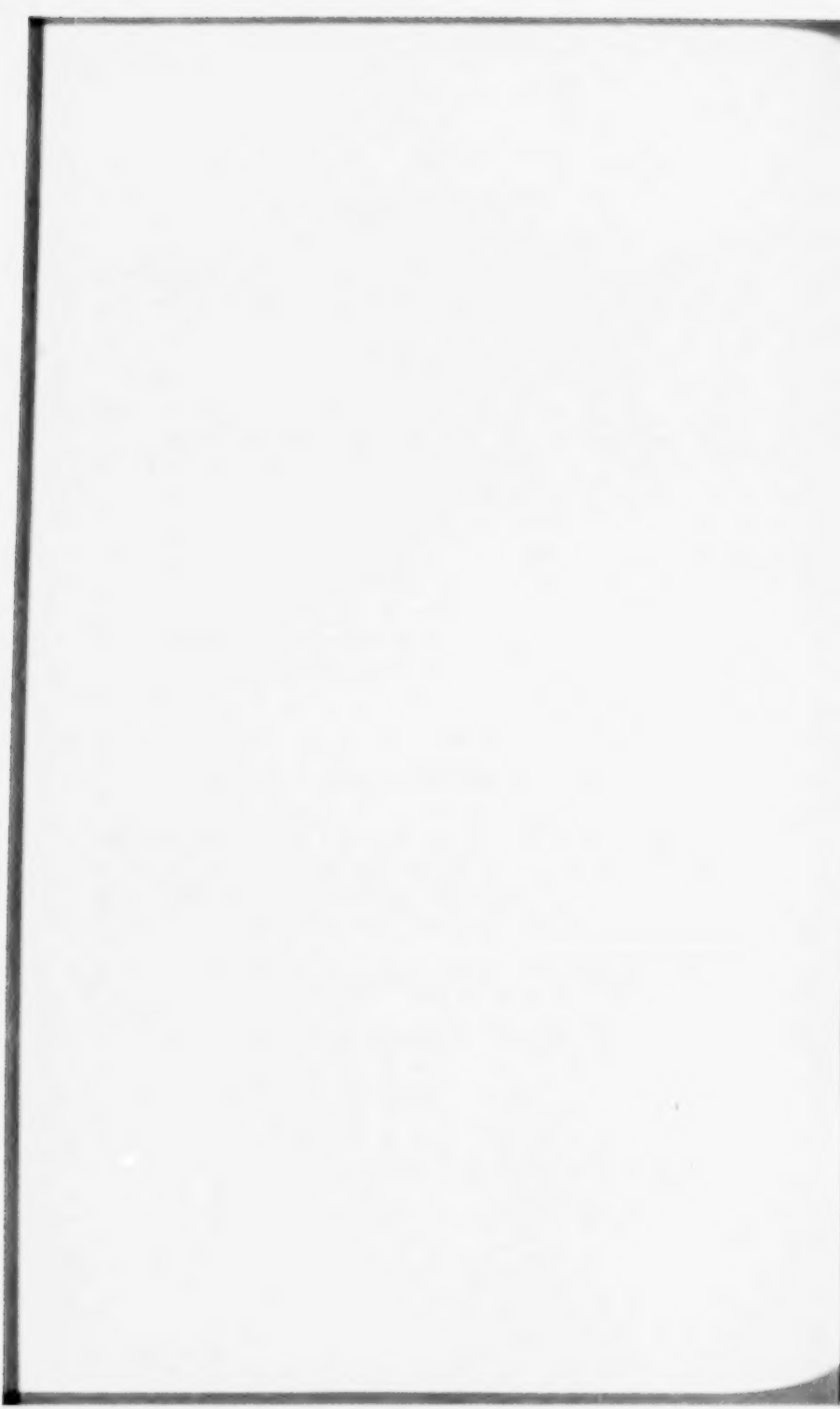
CERTIFICATE

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a writ of certiorari well founded and that it is not interposed for the purpose of delay.

LLEWELLYN A. LUCE

W. M. NICHOLSON

JOHN W. MUSKOFF



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APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6760.

KEITH M. BEATY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE. CRIMINAL.

(Argued June 1, 1954. Decided June 14, 1954.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

John W. Muskoff and Llewellyn A. Luce (W. M. Nicholson on brief) for Appellant, and James M. Baley, Jr., U. S. Attorney, for Appellee.

Soper, Circuit Judge:

Keith M. Beaty was convicted of violating Section 145 (b) of the Internal Revenue Code under an indictment in three counts, of which the first count related to the tax year 1945 and charged that the defendant did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States for that year by maintaining or causing to be maintained false books and records, by concealing assets and covering up sources of income, by preparing or causing to be prepared a false income tax return and by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of North Carolina a false and fraudulent income tax return wherein he stated that his net income for the calendar year was the sum of $48,490.98 and that the amount of tax due thereon was the sum of $24,350.55, whereas as he then and there well knew, his net income for the calendar year was $254,701.83 upon which he owed to the United States an income tax of $209,785.06.

The second and third counts in similar terms charged attempts to defeat and evade the income tax for the years 1946 and 1947 alleging in the second count as to 1946 a false and fraudulent return of income of $75,265.42 and a tax due of $42,526.74, whereas the income was $174,715.24 and the tax due was $125,565.03 for the year; and alleging in the third count as to 1947 a false and fraudulent return of income of $48,283.69 and a tax due of $22,937.04, whereas the income was $86,077.04 and the tax due was $50,960.08.

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The District Judge entered judgment of imprisonment for two years as to each of the counts of the indictment, the sentences to run concurrently and not consecutively. In addition the court imposed a fine of $10,000 on the first count of the indictment, a fine of $5,000 on the second count, and a fine of $5,000 on the third count, the fines to be cumulative, making a total fine of $20,000, in addition to the court costs.

The principal contentions on this appeal are that the court lacked jurisdiction over the offenses charged in the indictment and that the evidence was insufficient to sustain the verdict of the jury. The statute, 26 U.S.C. Int. Rev. Code, Sec. 53(b), requires that the income tax return of an individual shall be made to the collector for the district in which is located the taxpayer's legal residence or principal place of business. Beaty resided and was engaged in several business enterprises in Charlotte, North Carolina, in the Western District of North Carolina, in which the indictment was found and the case was tried; but the office of the Collector (now Director) of Internal Revenue was located in Greensboro, North Carolina, in the Middle District of North Carolina, where the tax returns of the defendant were filed. Hence it is contended that the offenses charged were triable only in the Middle District of North Carolina and the court below was without jurisdiction.

This contention, however, overlooks the fact that the defendant was not indicted for wilfully failing to make returns and pay the taxes in violation of Sec. 145(a), or for making returns which he did not believe to be true and correct as to every material matter, in violation of Section 145(c) of the statute, but for attempting to evade or defeat the payment of the taxes by maintaining false books and records, by concealing assets, and covering up sources of income, and by preparing and filing false and fraudu-

lent income tax returns. It has been held in cases where the charge was confined to an attempt to evade the tax by filing a fraudulent return that the offense was committed where the returns were filed. See the conflicting decisions in *United States* v. *Aaron*, N.D. W.Va., 117 F. Supp. 952, and *United States* v. *Albanese*, S.D. N. Y., 117 F. Supp. 736. The charge in the case at bar, however, includes the making of false records and the concealment of assets, and if any of these acts are proved to have occurred in the Western District of North Carolina, the case is made out and the trial court had jurisdiction.

We have had occasion to consider kindred questions in a number of earlier cases. In *Bowles* v. *United States*, 4 Cir., 73 F. 2d 772, we held that a resident of the District of Columbia, which is part of the Revenue Collection District of Maryland, was triable in the District Court for the District of Maryland for wilful failure to make an income tax return for 1930 and for a wilful attempt to evade the income tax of 1931 by filing a false and fraudulent return. In *Reass* v. *United States*, 4 Cir.,'99 F. 2d 752, we held that a defendant indicted for making a false statement to influence the action of a Federal Home Land Bank in Pittsburg, was triable in Pennsylvania where the statement was presented to the bank, and not in Maryland where the statement was prepared, since the essence of the crime was the act of delivering the statement to the bank. In *Newton* v. *United States*, 4 Cir., 162 F. 2d 795, however, we held that a defendant indicted for aiding in the preparation of a false and fraudulent claim in connection with an amended income tax return was triable in the Western District of Virginia where the claim was prepared, although the claim was filed in the office of the Collector of Internal Revenue in Richmond, in the Eastern District of the State. From the decision in the last mentioned case it appears that the crime there under consideration is committed by any person who "aids" or "as-

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sists in" the preparation of the return, and that the acts performed by the defendant in the preparation of the return took place in the Western District of Virginia. Resting the decision on this phrase Judge Dobie pointed out: (162 F. 2d 796)

> "All federal crimes are statutory, and these crimes are often defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb usually contains the key to the solution of the question: In what district was the crime committed? Without the exact language of the statute, particularly this verb, paraphrases and loose citations in this field are more than inaccurate; they are positively misleading. When, as is so often the case, the statute enumerates several such verbs, only scrupulous, even meticulous, nicety in exact quotation can prevent these statutes, as well as the decisions under them, from proving a snare and a delusion to the unwary."

See also *United States* v. *Johnson*, 319 U.S. 503, 514; *Shurin* v. *United States*, 4 Cir., 164 F. 2d 566. *Cf. United States* v. *United States District Court*, 6 Cir., 209 F. 2d 575.

In *Spies* v. *United States*, 317 U.S. 492, the court held that the wilful failure to make a return and to pay the tax, which are made misdemeanors by Sec. 145(a) of the statute, do not without more constitute attempts to evade or defeat the tax which is made a felony by Sec. 145(b). The court said: (317 U.S. 498, 499)

> "The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law 'attempt.' The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the

attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."*

We reach the conclusion that the District Court had jurisdiction in the case at bar since the prohibitory words of the statute are directed against "any person who wil-

* The court did not comment in this case on Sec. 145(c) of the statute which makes it a felony for an individual to make a return which he does not believe to be true and correct in every material manner.

fully attempts in any manner to evade or defeat any tax imposed by this chapter," and the proof relates to activities of the defendant performed in the Western District of North Carolina.

Beaty Service Company

In proof of the charges that the defendant attempted to evade payment of the income taxes by maintaining false records and covering up sources of income, the Government relies particularly upon the disparity between the income reported and the income received by Beaty in the tax years from the enterprises known as Beaty Service Company and Lancaster Distributing Company. The Beaty Service Company was nominally an incorporated body but there was abundant evidence to show that it was in fact Beaty's individual property. Only three qualifying shares of stock were ever issued, one to Beaty, one to his father and one to his brother. No records of corporate activities as such were kept and no dividends were paid. The father died in 1943 and there was no administration on his estate. The brother invested no money in the business and received none therefrom, except a salary.

The operating records of the business were kept in Beaty's office. The bank deposits were made by him and only such monies as he reported to the bookkeeper were recorded. He only was authorized to draw checks upon the bank account. He put up his own securities as bonds, under which the company operated. The employees received instructions from him alone, the corporate income tax returns were signed by him. Aside from the permissible inference that the corporation was only a name, and that the business belonged to Beaty individually, so that the income therefrom should have been included in his personal return, there was evidence to show that Beaty collected income from the business and did not deposit it in the corporate bank account. Receipts from the enter-

prise consisted of taxicab rentals, bonding fees from cabs owned by individuals who operated under the Beaty bonding system, and proceeds from the sale of automobiles. Taxicab rentals were $10 per day except on Saturdays and Sunday when they were $12 per day, payable at 6 P.M. on each day. During the tax years Beaty operated 32 to 38 cabs. Bonding fees amounted to $7 per week on 20 to 32 additional cabs operated by individual owners. Monies from these sources were placed in envelopes marked with the number of the cabs and delivered to Beaty's office and counted. Beaty made the deposits in the bank at irregular intervals and delivered duplicate deposit slips or the bank book to the bookkeeper so that entries might be made on the corporate books. No record was retained to indicate how much was received from any individual cab or individual driver, and the envelopes and daily check sheets were destroyed. Hence the only record of income was a cash journal made from the record of bank deposits furnished by Beaty, while the expenses were itemized in detail and receipts and documentary proof retained.

The record of the sales of the cars was also found to be defective. Ten sales which were proved to have been made were not recorded at all and 23 cars were reported to have been sold at prices less than the money actually received therefrom.

Under these circumstances the United States sought to prove the receipts of the business by producing 83 taxi drivers as witnesses who testified as well as they could as to the days they worked and the rental and bonding fees which they paid. The government also checked the reports of operations maintained under the local law by the Police Department of the City and produced an account of the true income prepared by tax accountants. This account tended to show that the income actually received by the

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Beaty Service Company or by Beaty, which was not reported either in the corporate or individual tax returns, amounted to $55,103.29 in 1945, $32,461.97 in 1946, and $21,696.85 in 1947, or a total of $109,262.11.

Lancaster Distributing Company.

The story of the Lancaster Distributing Company, which can only be given in broad outline, also gives support to the inference that Beaty received taxable income in 1945 and 1946 which he did not include in his returns. In the summer of 1944 he induced one E. C. Pundt, an auditor who had previously had charge of the books of the Beaty Service Company, and was a trusted friend, to go into the wholesale whiskey business. Pundt was totally inexperienced in this field and lacked financial means but Beaty promised to back him and accordingly Pundt set up the business in Lancaster, South Carolina, in September of that year. He advanced $7500 in cash, $2500 of his own money and $5,000 which he borrowed from one Passons. The first shipment of goods was received on open account from Sol Feldon of Baltimore, an associate of Beaty. Later shipments of substantial size were purchased with funds borrowed from the American Trust Company on collateral furnished in every case by Beaty which at times amounted to as much as $250,000. Beaty himself made numerous trips to New York and Philadelphia to purchase the goods, Pundt remaining in South Carolina except for a few trips to Philadelphia. Beaty had and exercised the right of drawing checks on the bank account.

The testimony of Pundt as to the ownership of the business was in effect that at the outset he was to be the proprietor and Beaty the backer of the enterprise; but it is evident that Beaty was the monied man and exercised actual control from the beginning. This was made clear

by the execution of a document some time after the establishment of the business in September, 1944 and before its subsequent incorporation in March of 1946, wherein it was agreed that Pundt and Passons were to work for the business on a salary basis and Beaty was to have complete control. Pundt's copy of this document was later destroyed but there was no denial of its existence and Pundt himself, during his examination as a witness, declared that it was for some one else to determine the ownership of the business since he did not know whether he was competent to do so himself.

Moreover, on one occasion Beaty told a whiskey man in Baltimore that the business of the Lancaster Distributing Company was his and that Pundt was running it for him. On another occasion Beaty used an indebtedness due by the business to Feldon as a credit on an indebtedness due by Feldon to him. Again in 1946, when Pundt gave a check for $5,000 to the United States in part payment of income taxes due by the business, Beaty undertook to stop payment on the check.

It is manifest that the jury might well have found that the business belonged to Beaty and that the income therefrom was taxable to him. The evidence indicated a business of substantial size in 1944, 1945 and 1946, from which profits covered by tax returns in Pundt's name were derived. Using approximate figures the sales in 1944 amounted to $400,000 and the profits $24,000; in 1945 the sales amounted to $2,000,000 and the profits $93,000; in 1946 (three and a half months) the sales amounted to $1,000,000 and the profits $37,000. The aggregate income taxes paid for these years amounted to approximately $72,000, leaving a deficit in taxes of $5,000. It appears that the profits were allowed to remain in the business and that no money was paid by Pundt to Beaty other than enough to cover his traveling expenses and a salary which

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in amount exceeded the salary paid to either Pundt or Passons. Had these profits been reported as the income of Beaty, his taxes would have been substantially increased and would have exceeded the combined taxes paid in his name and in the name of the business. In 1945 the defendant paid an income tax of $24,350.55 but had he included in his income the profits of the Lancaster Distributing Company, his taxes would have amounted to $94,487.05. The personal return of Pundt for the year 1945 showed taxes of $56,994.41, so that by dividing the income as above indicated, the loss to the government was $13,142.09. The Government suffered a similar loss in the year 1946.

In March, 1946 it was decided to incorporate the business under the same name and the evidence indicates that thereafter the business was unprofitable and the details need not be recited herein. It is sufficient to say that upon incorporation common stock in the sum of $100,000 was subscribed, of which Beaty paid $51,000 in cash and Pundt and Passons $24,500 each, which was borrowed from the American Trust Company on notes endorsed by Beaty. In 1946, when Petrushansky, a Baltimore whiskey dealer, and his auditor came to Charlotte to reconcile an account for merchandise, Beaty gave them to understand that he was the owner of the Lancaster Distributing Company, Inc.

Expert Testimony of Parrish and Cline.

In order to reduce the complicated facts of the Beaty business enterprises to comprehensible form and scope, the government made use of the services of John F. Parrish and R. L. Cline, Treasury Department accountants, and placed them on the stand to explain their investigations and to give their opinion as to the correctness of the defendant's tax returns. It is now objected that Parrish was not qualified as an expert and that it was an invasion

of the province of the jury to allow either accountant to express an opinion as to the meaning of the evidence.

There was no error in allowing Parrish to testify as an expert witness. The defendant raised no objection to his qualifications when he was offered as an expert and if there had been objection, it would have been proper to overrule it, for the witness started as an employee of the Government Accounting Office in 1937, later had three years' experience as an auditor and cost accountant, and after service with the armed services for three and a half years, was appointed Special Agent in the Intelligence Division of the Treasury Department and shortly thereafter was assigned to investigate the defendant's liability under the income tax law. His performances in this case indicate that he knew his business.

Before reaching conclusions in the matter, Parrish carefully examined all the books and records made available to him by the defendant. For example, he studied the books of account and the bank account of the Beaty Service Company, the semi-monthly reports of the business to the Charlotte Police Department signed by Beaty and filed in obedience to a city ordinance, and in the absence of the daily reports of the taxi drivers, which had not been preserved, he interviewed more than one hundred men to ascertain the average rental and bonding fees paid to the company; he also checked the automobile records of the State and the prices paid by the purchasers of the cars. By these means he was able to reconstruct with substantial accuracy the income of the company from these sources and to compare it with the amounts shown on the income tax returns; and in order to make his conclusions easily understood, he prepared charts which were exhibited to the court and jury. The basis of these conclusions was shown by the introduction of the records in evidence and the production on the witness stand of the taxi drivers and car purchasers.

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It does not appear that the charts were formally introduced in evidence, but to all intents and purposes they formed a part of the testimony. They were exhibited to the jury, and at the end of the case were taken by the jury to their room to be examined during their deliberations upon the verdict. It is objected that the charts were shown to the jury before the supporting evidence was introduced, and that it was improper for them to be taken to the jury room at the end of the trial. Doubtless the more regular procedure would have required the introduction of the supporting evidence before the conclusions of the experts were shown; but this evidence was finally made available, and most of it was produced before the cross examination of the witnesses began. The defendant suffered no prejudice by the order in which the testimony was adduced. There was likewise no impropriety in affording the jury an opportunity to examine the charts before rendering their verdict, since the attorney for the defendant himself consented "to putting any and all of the evidence in" and thereupon the charts were taken to the jury room in the presence of the attorney without objection.

All of the facts hereinbefore recited tending to show that the Lancaster Distributing Company before incorporation was the personal property of Beaty and did not belong to Pundt were also put in evidence independently of the testimony of the expert witness.

The witness Cline in 1945 also undertook an investigation of the Beaty business, and pursued much the same course as Parrish. He also demonstrated that in 1945, 1946 and 1947 Beaty made large expenditures in excess of those reported in his tax returns for these years. It is objected that this evidence was devoid of probative effect because the amount of money in Beaty's possession at the beginning of the period was not shown in the evidence and

hence the money expended by him may have been derived from this source. This evidence, however, if not conclusive, was admissible for the light it threw on the defendant's methods of carrying on business. See *Bell* v. *United States*, 4 Cir., 185 F. 2d 302, 310. For example, in 1945 these expenditures included $20,000 deposited as collateral for a loan with the bank; and in the same year the bank released to the defendant $70,000 in cash which had been placed with the bank prior to 1945 as collateral for a note. No explanation is given for such transactions. In 1946 these expenditures amounted to more than $64,000 including more than $10,000 deposited in cash with the broker, and $51,000 in cash deposited in the bank at the time of the incorporation of the Lancaster Distributing Company.

The trial judge was careful to instruct the jury that they were in no sense bound by the expression of opinion by the expert witnesses, although it was based on substantially all of the evidence adduced in the case. The judge at the conclusion of the Parrish testimony, cautioned the jury that the evidence of Parrish was merely his opinion and consisted of a recapitulation of the figures which the Government contended showed the unreported income of the defendant; that the jury were to accept these opinions only if they were satisfied beyond a reasonable doubt that the opinions were predicated on facts testified to in the evidence; and that if the opinions were not supported by the evidence it was the duty of the jury to disregard them and to base their conclusions upon the evidence which they believed to be true. A similar caution was given to the jury with respect to the expert testimony in the charge of the court at the conclusion of the case. The course followed by the court in this case was in accordance with the established rule. In *United States* v. *Johnson*, 319 U.S. 503, the court was confronted with a question which arose under similar circumstances and said: (319 U.S. 519)

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"• • • No issue was withdrawn from the jury. The correctness or credibility of no materials underlying the expert's answers was even remotely foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury. The judge's charge was so clear and correct that no objection was made, though, of course, there were exceptions to the refusal to grant the usual requests for charges that were either redundant or unduly particularized items of testimony. The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumptions of the case. So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules."

Restriction of Cross-Examination

The defendant contends that the judge erred in unduly restricting the cross examination of the Government's expert witness Parrish, and in making improper comments to the jury in so doing. The subject under cross examination at the time that the rulings complained of were made was the investigation that the witness had made of the records kept or filed by the defendant in respect to the operation of the taxicabs of the Beaty Service Company. The purpose was to show that the witness in calculating the time when certain cabs were operating and producing revenue had not made sufficient deductions when the cabs

were idle and undergoing repairs. We have examined the transcript of record and we do not find that the defendant's attorney was prevented from bringing out the facts favorable to his case in this or any other respect. Nor do we find that the judge transgressed his authority in making the comment during the cross examination that the expert could not be blamed for errors in his calculation which were based on records prepared or filed by the defendant.

The cross examination of the witness consumed two and a half days during which he was subjected to a rigorous questioning on every phase of the case. The scope of cross examination is ordinarily discretionary with the trial judge and particularly must this be so when complicated transactions are involved and the cross examination may be drawn out to such an extent as to obscure the object in view. The cross examination of a witness is a matter of right but the trial judge has the power and duty to keep it within a proper limit. We do not find that there was any abuse of this discretion in the pending case. See *Alfred* v. *United States,* 282 U.S. 687, 694; *Bell* v. *United States,* 4 Cir., 185 F. 2d 302, 310; *Beaty* v. *United States,* 4 Cir., 203 Fed. 652, 656; *Garber* v. *United States,* 6 Cir., 145 F. 2d 966, 970; *Pullman Co.* v. *Hall,* 4 Cir., 55 F. 2d 139, 141.

Objections to the Charge in the Presence of the Jury.

The defendant also contends that at the close of the judge's charge his attorneys were required to state their objections to the charge in the presence of the jury in violation of Rule 51 of the Federal Rules of Criminal Procedure, which directs that an opportunity shall be given to counsel to make their objections to the charge in a criminal case out of the hearing of the jury.

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The judge in the pending case, at the end of his charge, inquired whether the attorneys desired any further instructions. The defendant's attorneys suggested that the court had failed to mention certain matters in evidence and had not instructed the jury as to the rules governing circumstantial evidence although he had previously indicated that he would give an instruction on this point. The court thereupon stated that a charge on circumstantial evidence was not required in the case, but made certain additions to the charge. He then inquired again whether the defendant had any additional objections to the charge. At no time did the attorneys for the defendant request that the jury be excluded during the discussion of the charge and they do not now indicate that they were in any way prejudiced by the discussion which took place in the jury's presence. Under these circumstances the failure of the court to exclude the jury did not constitute reversible error.

There was no error in refusing a requested instruction of the defendant on the subject of circumstantial evidence. In the request it was stated that the United States relied in the case upon circumstantial evidence and that if the evidence as to any essential element was circumstantial only, it must be of such a character as to exclude every reasonable hypothesis except that of guilt; and if it was not, the defendant should be acquitted. The instruction as offered was too broad because it implied that the case of the Government was based substantially on circumstantial evidence whereas a great part of the evidence was direct. Moreover, the charge of the court was so clear as to the doctrine of reasonable doubt that the jury could not have been misled by the failure to have a charge expressly directed to evidence circumstantial in character. The judge not only called the attention of the jury to the need to be satisfied beyond a reasonable doubt during the course of the taking of the testimony, but at the end of

the case instructed the jury that the burden was on the Government to prove the case; and that the income taxes due by Beaty during the years 1945, 1946, and 1947, as charged in the indictment, must be shown to have been due by him beyond a reasonable doubt; and that the jury must be satisfied also beyond a reasonable doubt that Beaty wilfully and knowingly attempted to evade his income tax obligations to the United States. We are satisfied that the defendant was given every instruction to which he was entitled.

There was no error in the words of caution addressed to the jury at the beginning of the case when the judge warned the jury not to talk about the case to members of their family or any one else, and that they should bear in mind that they might be watched by some agency that had in mind the prime purpose of seeing that a fair verdict should be rendered. The case was doubtless much in the public eye due to the variety and extent of the activities of the defendant in the community and the actions of the jury during the long trial were necessarily more or less in the public eye. We do not find that there was any prejudice to the defendant in this action.

Nor do we find that there was prejudicial error at the conclusion of the case when the foreman of the jury was permitted to come alone into the court room from the adjoining jury room and to ask of the court whether a recommendation could be made by the jury in favor of the defendant because of the condition of his health. To this the court replied that a recommendation on the part of the jury was always proper and would be considered by the court. This occurrence took place after the jury had the case under consideration for a considerable period of time, and thereafter the jury returned a verdict of guilty with a recommendation of mercy. Undoubtedly communications between the court and the jury should be

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made in the presence of all of the jurors; but it is manifest that the communication of the court to the foreman of the jury in this case was reported by him to his colleagues and that the defendant was in no way prejudiced by the jurors' recommendation, as will appear from the fact that the judgment of the court, insofar as imprisonment is concerned, was limited to two years on each count, to run concurrently.

Affirmed.

JUDGMENT

Filed and Entered June 14, 1954

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6760

Keith M. Beaty, Appellant,

vs.

United States of America, Appellee.

APPEAL FROM the United States District Court for the Western District of North Carolina

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THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 14, 1954.

MORRIS A. SOPER
United States Circuit Judge.

Title 28, United States Code, 1952 Edition:
Section 1254. Courts of Appeals; certiorari; appeal; certified

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; • • •"

Internal Revenue Code, Title 26:
Sec. 145(b). Penalties.

> "Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (26 U.S.C. 1946 ed., Sec. 145 (b))."

Sec. 53 (b).

> "(b) To Whom Return Made.—
> "(1) Individuals.—Returns (other than corporation returns) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland."

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Section 3740, Title 26 of the Internal Revenue Code and the United States Code provides:

"AUTHORIZATION TO COMMENCE SUIT.

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced, 53 Stat. 460."

Section 3761, Title 26 of the Internal Revenue Code and the United States Code provides:

"COMPROMISES—(a) AUTHORIZATION.

"The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

Executive Order No. 6166, Section 5 (promulgated June 10, 1933, 5 U.S.C. 1946 Ed., Section 124-132) provides as follows:

"The functions of prosecuting in the courts of the United States claims and demands by and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

"For the exercise of such of his functions as are not transferred to the Department of Justice by the

foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

"Nothing in this section shall be construed to affect the function of an agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense."

Circular Letter No. 2431 issued by the Attorney General pursuant to Executive Order 6166, supra, after quoting part of Section 5 thereof, provides as follows:

"In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted."

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA:

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rules of Criminal Procedure: (18 U.S.C.A. following Section 687)

Rule 30. Instructions. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies

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of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Federal Rules of Civil Procedure: (28 U.S.C.A. following Section 723)

Rule 51.—Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

PROCEEDINGS

(Instructions to Jury)

* * * *

"* * * You know not but what you may be watched by some agency that has in mind the prime purpose of seeing that a fair verdict is rendered in this case. We want everybody to have that, and nothing else and nothing more. Your verdict is to be spoken if and when you have heard all the evidence and you ultimately agree upon what you believe the truth is.

"So, if there would be anyone who would undertake in some way or another to speak to you, you be sure and you be certain that you get his name to the extent that even if you are compelled to take him in possession under your own force and hold him until you are heard, or until you can secure aid to have that individual brought before the Court. Don't you let anyone talk to you. Don't talk to your family or to your wife or to anybody else about the case, for I say to you that you might be watched, and if such should occur, then you, as a member of the jury, likewise would be amenable to punishment for having desecrated the oath of your office."

• • • •

(Minutes of trial, pages 53 and 54.)

PROCEEDINGS

"THE COURT: You have examined all of these records, have you not?

"THE WITNESS: Yes, sir.

"THE COURT: OVERRULED.

"THE WITNESS: From the examination of these records and inquiry of the individual drivers that they listed as operating those taxicabs, that is the determination.

"Q (By Mr. Beaty) Now, Mr. Parrish, did you make a similar determination for the year 1946, with the amounts set out on the chart?

"A Yes, sir. Those were arrived at in the identical way as those explained in the previous year, 1945.

"MR. LUCE: I MOVE TO STRIKE those figures, Your Honor, on this ground, that they are obviously based on hearsay from the drivers unless it is only accepted as his opinion of what is due and nothing more.

"THE COURT: I am letting it go in on the theory that they are based on examination of the various records on which income is alleged to be due and in his opinion

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those amounts were understated in the sum set out there. That is the theory. OVERRULED.

"Q (By Mr. Baley) Now, then, in your opinion, from the examination which you have narrated during the course of your testimony, Mr. Beaty failed to report $142,402.94 for the year 1945?

"A That is correct.

"Q Upon which he owed an additional tax of $125,-629.33?

"A That is correct.

"Q For the year 1946, he failed to report $80,328.17, upon which he owed a tax of $66,774.78.

"MR. NICHOLSON: Your Honor, I OBJECT to the form of that question. He is just testifying. Let the witness tell what is going on up there on that screen.

"THE COURT: He is asking him if those are the figures?

"MR. NICHOLSON: He is repeating before the jury there. I OBJECT to it.

"MR. BALEY: And for the year 1947, Mr. Beaty failed to report additional income of $21,161.12, upon which he owed $15,183.56.

"MR. NICHOLSON: OBJECTION.

"THE COURT: Is that what you would testify to, repeating the question?

"THE WITNESS: Yes, sir.

"THE COURT: All right. It would be best, Mr. Baley, to ask him the questions and let him give the jury the figures, because he, after all, is the one testifying."

• • • •

(Minutes of trial, pages 120, 121, 122.)

(Note: Typographical error in Minutes. Examiner should be spelled "Baley" rather than "Beaty".)

PROCEEDINGS

"THE COURT: If you will, tell the jury to come in, please sir.

"THE MARSHAL: Just the Foreman, sir. The Foreman asked to see you, sir.

"THE COURT: (As the foreman speaks to the Court) It will have to be a public statement.

"FOREMAN CARRIKER: Can any recommendation be made on—

"THE COURT: State that out loud, please sir.

"FOREMAN CARRIKER: I just want to know of the Court if any recommendation can be made because of health conditions.

"THE COURT: A recommendation is always proper to be made by the jury, and if made by the jury as part of their verdict returned will be adhered to by the Court.

"FOREMAN CARRIKER: Thank you, sir.

(Whereupon the Foreman retires to the jury room.)

(R. 534-535.)

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